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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE*

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1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in

* Consents of all parties to the Chamber's participation have been filed with this Court.

excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.*

3. The question presented in the instant case is whether a building trade union violates the antitrust laws by compelling an employer with whom it has no collective bargaining relationship to execute an agreement requiring it to cease doing business with non-union employers and restricting the persons within the construction industry with whom the employer may do business to those who have a collective bargaining agreement with that union. This matter is of particular concern to the Chamber's members since a significant number of them are users of construction products and services and are directly affected by schemes which impact upon construction costs. The holding of the court below would permit building trade unions to control business relationships between employers and dictate the costs of construction. Since virtually every time a union engages in conduct in violation of the Sherman Act it will contend that its

* *E.g., Gateway Coal Company* v. *United Mineworkers of America, et al.*, ... U. S. .... (Jan. 1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.* (Supreme Court), No. 72-1554, *Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife* v. *Charles Odegaard, President of the University of Washington, et al.* (Supreme Court), No. 73-235; *Corning Glass Works* v. *Brennan* (Supreme Court) No. 73-29; *N. L. R. B.* v. *Bell Aerospace Company Division of Textron, Inc.* (Supreme Court), No. 72-1598; *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 517 (1971).

conduct is immune from the proscriptions of the antitrust laws, the further question of whether that conduct is protected under the labor laws must be resolved by the court. If the decision of the court below is not examined by this Court, employers will be deprived of a judicial forum for the resolution of a question which affects their very life in the marketplace.

4. The problem presented here has not been resolved by this Court. The tension resulting from misunderstanding of this Court's *Jewel Tea* reconciliation of the policies represented by the labor laws and antitrust laws invites persistent and recurrent litigation. Because of its broad representation of employers, the Chamber is in a position to present arguments to the Court which might not otherwise be advanced by the parties.

REASONS FOR GRANTING THE WRIT

I.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The instant case raises issues involving the historic clash between two national policies which are in basic conflict. Competition, the policy fostered by the antitrust laws, is the very heart of our economic system. Antitrust policy is designed to promote economic efficiency, consumer welfare and a system of diffused power. National labor policy, on the other hand, permits concentration of economic power in the hands of large national labor unions which gives them the capability to frustrate the goals of the antitrust laws.[1] The conceptual difficulty posed by this conflict has been a troublesome issue which this Court has traditionally resolved by accommodating the coverage of the antitrust laws to the policy of the labor laws.[2]

In the instant case, however, the court below failed to adhere to the historical analysis performed by this Court in the *Jewel Tea*[3] decision, which resulted in this Court's conclusion that unions, acting without non-labor co-participation could violate the provisions of the Federal Antitrust laws if they were not acting in pursuit of "legitimate labor interest"; that the pursuit of

1. Meltzer, *Labor Unions, Collective Bargaining and Antitrust Laws*, 32 U. Chi. L. Rev. 659 (1965).

2. See, *e.g.*, Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B. U. L. Rev. 317 (1966); DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. Pitt. L. Rev. 705 (1972); Feller & Anker, *Analysis of Impact of Supreme Court's Antitrust Holdings*, 59 LRRM 103 (1965); Handler, *Labor and Antitrust: A Bit of History*, 40 Antitrust L. J. 233 (1971); Meltzer, *supra;* Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 Yale L. J. 59 (1965); Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 Col. L. Rev. 742 (1966).

3. *Local 189 Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965).

such "legitimate labor interest" required a legitimate relationship between the union and the employer or employers upon whom the union was making demand; and that the measure of whether or not the "interest" being sought by the union was "legitimate" was whether that interest furthered some protected right guaranteed to the union or to employees whom the union represents by the National Labor Relations Act.

The avoidance by the court below of these specific teachings of this Court has imperiled the statutory safeguards which were Congressionally designed to permit free competition in the marketplace, has led to confusion as to the meaning of these statutory rights and obligations, and can only serve to contribute to proliferating conflict and litigation.

A definitive statement by this Court is required for a clear national understanding of not only the pronouncements of the *Jewel Tea* case as set forth above, but also for an awareness of the proper accommodation of the so-called construction industry proviso to Section 8(e) of the National Labor Relations Act with the Federal Antitrust Laws and the specific awareness that (1) a contract requiring a general contractor to terminate his business relationships with subcontractors who do not have a collective bargaining agreement with a union and to do business only with those who have such an agreement, as was sought here, even if it falls within the ambit of that proviso is not *protected* under the National Labor Relations Act, but simply not outlawed and, therefore, does not have the stature of a protected right such as was sought by the union in *Jewel Tea;* (2) that even if the contract sought was within the Proviso to Section 8(e), union activity in pursuance thereof which violates other provisions of the National Labor Relations Act taints all of the union's conduct and necessarily precludes such conduct from being in furtherance of a "legitimate labor interest"; and (3) that even if the union pursuing such agreement did not engage in other conduct specifically violating other provisions of the Act in that pursuit, the agreement and effort to obtain such agreement from

an employer with whom the union has neither a collective bargaining relationship nor any statutory right to a collective bargaining relationship is not within the ambit of the Section 8(e) proviso and necessarily precludes any effort to obtain such a contract from being in pursuit of a "legitimate labor interest".

For the foregoing reasons, each of which is more fully explicated hereinafter, it is of paramount concern to American industry in general and the myriad of directly affected employers, employees and unions concerned with the problem described herein that this Court should grant the Petition for Certiorari heretofore filed by the Petitioner herein.

II.

THE LOWER COURT FAILED TO ADHERE TO THIS COURT'S DECISION IN JEWEL TEA; THE RESULT OF THIS FAILURE IS THE DESTRUCTION OF COMPETITION IN AN ENTIRE INDUSTRY

In the instant case, the Respondent Union, through coercive picketing, forced from Petitioner Connell, a general contractor, an agreement that Connell would not contract with subcontractors for construction work unless those subcontractors were bound to a particular collective bargaining agreement executed with the Union.

There is no collective bargaining relationship between Connell and the Union, nor does the Union have any organizational interest in Connell's employees because Connell employs no category of employee which the Union seeks to represent. Moreover, the Union's objective could not have been an organizational interest in the subcontractor's employees on the job site involved, nor to gain or preserve any work for its members on the picketed job site since the subcontractor on that job employed members of the Union and had a collective bargaining agreement with it.[4]

4. Opinion of the Fifth Circuit, ... F. 2d at ....., 84 LRRM at 2002.

As a result of the subcontractors' agreement, coerced by the Union, Connell is restrained from doing business with any other employer until that employer enters into a "master" area collective bargaining agreement which the Union offers. The Union, once having forced the subcontractors' agreement from Connell, necessarily has the power to select the companies with whom Connell may do business. Indeed, the Union has a stranglehold on the entire construction industry within its work and area jurisdiction for if any subcontractor and the Union are unable to reach agreement as to the terms of a labor contract, that subcontractor cannot do business with any owner or general contractor, supplier, or manufacturer from whom the Union has obtained an agreement similar to the one coerced from Connell —even if that subcontractor's employees were already members of a labor organization other than the Union. Divorced from the collective bargaining context and having no organization or work preservation objective, the Union's subcontractors' agreement, its procurement and maintenance, are beyond the scope of legitimate labor activity and unprotected by the National Labor Relations Act. As such, the Union's activities are not exempt from the antitrust laws and are a violation thereof.

The Fifth Circuit below, however, found the Union's conduct and the subcontractors' agreement at issue immune from the antitrust laws by reasoning which failed to critically analyze relevant legislative history and case law. Instead, the majority below posited a test for Union immunity far broader than that conferred by the decision of this Court upon which the majority relied. While it recognized the principle established by this Court in *Jewel Tea*, that a labor organization can lose its Sections 6 and 20 Clayton Act[5] immunity and violate the antitrust laws by engaging in anti-competitive conduct which has no legitimate union interest, the majority below reasoned that a Union's conduct can promote a "legitimate union interest" regardless of whether the conduct is unlawful or unprotected under

5. 15 U. S. C. Sec. 17; 29 U. S. C. Sec. 52.

the National Labor Relations Act, as amended,[6] and regardless of whether the effect of such conduct constitutes an impermissible restraint on trade. The majority's failure to adhere to the teachings of *Jewel Tea* allowed the court to avoid consideration of the antitrust aspect and effects of the Union's conduct and to dismiss the antitrust suit, concluding that since the conduct complained of was arguably an unfair labor practice, the National Labor Relations Board should determine its legality under the National Labor Relations Act.

Thus, the majority below avoided the confrontation inherent in the instant case by reasoning which segregates rather than accommodates the operation of the antitrust laws with that of the labor laws. In doing so, the majority disregarded the specific teachings of *Jewel Tea* and failed to engage in the analysis mandated by the historical accommodation of those bodies of law.

The required analysis reveals that anti-competitive union conduct is unprotected under the labor laws and violates the antitrust laws.

III.

THE DECISION OF THE COURT BELOW IS CONTRARY TO JUDICIAL AND LEGISLATIVE HISTORY AND THE CONCEPT OF STATUTORY ACCOMMODATION; A LABOR ORGANIZATION WHICH RESTRAINS TRADE BY ENGAGING IN CONDUCT UNPROTECTED BY THE LABOR LAWS, VIOLATES THE ANTITRUST LAWS

The question presented in the instant case is whether Respondent, a building trade union, violates the antitrust laws by compelling Petitioner, with whom it has no collective bargaining relationship, to execute an agreement requiring Petitioner to cease doing business with non-union employers and restricting the permissible persons with whom it may do business to those having a particular collective bargaining agreement with Respondent. The teachings of *Jewel Tea* compel the conclusion, contrary to the decision of the Court below, that the described union conduct is not immune from coverage of the antitrust laws, but, rather, violative of the proscriptions contained therein.

6. 29 U. S. C. Sec. 151, *et seq.*

In *Jewel Tea, supra*, a union, which had a collective bargaining relationship with the employer, insisted upon an agreement limiting the employer's hours of operation. In *Jewel*, there was no conspiracy or combination with a non-labor source, yet this Court indicated that unions, acting unilaterally, can violate the Sherman Act, 15 U. S. C. Sec. 1, *et seq.*, if they restrain trade, and if their conduct is unrelated to legitimate labor activity.[7]

The Court considered the labor exemption "in light of national labor policy", *Jewel Tea, supra*, at 699, and stated that the question of exemption involved "acommodating the coverage of the Sherman Act to the policy of the labor laws." *Jewel Tea, supra*, at 689.

The Court made this accommodation and found that the agreement on hours of operation was a legitimate union objective because employees' particular hours of work was a subject within the "realm of 'wages, hours and other terms and conditions of employment" about which employers and unions must bargain under the National Labor Relations Act, and because the subject matter related to employees within the *particular bargaining unit* and affected working conditions of those bargaining unit employees. *Id.*, at 691. The Court noted, though, that union demands and agreements under certain circumstances could violate the antitrust laws:

> "[t]he *limitation* [unrelated to the working hours of the employees in the bargaining unit] *imposed by the unions might well be reduced to nothing but an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from*

7. The Union in *Jewel* urged that absent a conspiracy or combination with a non-labor source, no violation of antitrust laws could be maintained. This Court rejected the Union's contention. *Jewel Tea, supra*, at 688.

the Sherman Act. Whether there would be a violation of Sections 1 and 2 would then depend on whether the elements of a conspiracy in restraint of trade *or an attempt to monopolize had been proved*." *Id.* 692-3. (Emphasis supplied.)[8]

Thus, under *Jewel Tea*, unions acting unilaterally can violate

8. In the companion case, *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), though that case did involve conspiracy between a union and employers, Mr. Justice White stated with respect to employer-union agreements which seek to regulate labor relations outside the bargaining unit:

> "From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy. See, *e.g.*, *Associated Press* v. *United States*, 326 U. S. 1, (1944), 19; *Fashion Originators' Guild* v. *Federal Trade Comm'n.*, 312 U. S. 457 (1941), 465; *Anderson* v. *Shipowners Assn.*, 272 U. S. 359 (1926), 364-365."

In the instant case, the only agreement that the union would sign with any subcontractor was a "master agreement" which provided:

> "The Union further agrees that during the life of this Agreement that it will not grant or enter into any arrangement or understanding with other employer which provides for any wages less than stipulated in this Agreement as the minimum wages for work under any more favorable term or conditions to the employer that are expressed or implied in this Agreement for less than the rate of wages indicated in this Agreement."

Thus, here the Union, by forcing general contractors, such as Connell, to sign the subcontractors agreement and then by permitting the subcontractors to sign only the "master agreement" containing the above provisions, engages in the type of monopolistic restraint condemned in *Pennington*.

the Sherman Act if they restrain trade for a favored class of employers and if their conduct is not legitimate labor activity.

Though this Court was fragmented in *Jewel Tea*, and this fragmentation of view has lead to the confusion which permeates this area,[9] one factor stands out clearly in the various opinions. Mr. Justice White, in his majority opinion, expressed the view that union-imposed restrictions would be antitrust exempt only if those provisions were intimately related to traditional areas of labor concern, such as wages, hours and working conditions, so as to come within the ambit of protection afforded by national labor policy. Mr. Justice Goldberg, in the concurring opinion, expressed a broader exemption, extending to all mandatory subjects of collective bargaining.[10] However, no matter which of these two views one follows, the critical factor in determining legitimacy in each instance is whether the object sought relates to a legitimate issue of collective bargaining between an employer and a union in a particular bargaining unit.

In the present case, unlike *Jewel Tea*, there is no bargaining relationship between Connell and the Union. Moreover, there is no basis for the establishment of such a relationship. Applying even the broader Goldberg formulation, the Union in the instant case could not have been insisting upon a mandatory bargaining subject because there was no collective bargaining relationship. The subcontractor agreements sought by the union are completely divorced from the collective bargaining context. They are the type of "extra-unit" agreement condemned in *Pennington*, *supra*, the net effect of which is restraint of the product market, accomplished by fixing the subcontractors' wage costs for the entire industry in the "master" collective bargaining agreement and by forcing the general contractors to cease doing business with those who do not accept the "master" agreement.[11] Such conduct has never in the history of labor's

9. See, authorities cited in Footnote 2, *supra*.

10. Mr. Justice Douglas, in his dissenting opinion, felt that since the limitation imposed by the union restricted competition in the marketing of goods and services, it was no different than price-fixing.

11. See, note 6, *supra*.

exemption from the antitrust laws been given immunity from their proscription.

A. The History of Labor's Immunity from the Antitrust Laws

The history of labor's exemption reveals that it has never been extended beyond the scope of legitimate labor activities involving the working conditions of employees in a given bargaining unit; that it has depended on whether the unions' activities have intentionally affected the product market in interstate commerce; and that it has depended on an accommodation of the federal labor and antitrust policies.

The Sherman Act provides no immunity for labor union conduct. Thus, at the outset, union secondary product boycotts were condemned antitrust activity. *Lowe* v. *Lawlor*, 208 U. S. 274 (1908). Even after passage of what has been termed the Clayton Act labor exemption,[12] only conduct in furtherance of a dispute between an employer and a union which represented that employer's employees, (a primary dispute), was exempt from the antitrust laws; but secondary disputes, which affected the product market were still illegal. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 433 (1921); *Bedford Cut Stone* v. *Journeymen Stonecutters Association*, 274 U. S. 37 (1927).[13]

Following enactment of the Wagner Act, this Court decided *Apex Hosiery* v. *Leader*, 310 U. S. 469 (1940). *Apex* involved a primary strike over a union's demands for a union security clause in any collective bargaining agreement negotiated between it and the primary employer. The strike delayed interstate transportation of the employer's goods. However,

12. Clayton Act, Section 6, 15 U. S. C. Sec. 17, and Sec. 20, 29 U. S. C. Sec 52.

13. Of course, the requisite intent or effect of the union's conduct on the product market must be demonstrated in all cases. *United Leather Workers* v. *Heckert*, 265 U. S. 457 (1924); *Mine Workers* v. *Coronado Co.*, 259 U. S. 344 (1922), [Coronado I]; *Mine Workers* v. *Coronado Co.*, 268 U. S. 295 (1925) [Coronado II].

this Court found that such primary activity did not violate the Sherman Act. The Court recognized that while a labor strike in a collective bargaining context necessarily impacts upon the primary employer's competitive position, such impact is an effect that results from restraint on the labor market, rather than on the product market, which, in a primary dispute, renders the conduct free from antitrust proscription. *Apex* at 504.

In the year following *Apex*, the Court decided *United States* v. *Hutcheson*, 312 U. S. 219 (1941). *Hutcheson* was a criminal prosecution under the antitrust laws which involved a jurisdictional dispute between two unions over a work assignment on a building site for Anheuser-Busch. The union which failed to get the assignment organized a strike among employees of contractors working on the site and instituted a boycott of the Company's beer. Although the union's secondary activity would have been a violation of the antitrust laws under *Duplex* and other earlier cases, the Court found that since the Congress had removed union secondary conduct from the injunctive powers of the federal courts by enactment of the Norris-LaGuardia Act,[14] such conduct, protected by Norris-LaGuardia, could not be violative of the Sherman Act. *Hutcheson, supra*, at 236. Thus, the Court accommodated the coverage of the antitrust law with the protection afforded by the labor law. If the same accommodation were made in the instant case, Respondent's activities, which are now prohibited by the National Labor Relations Act, as amended, and unprotected by the labors laws are, therefore, subject to Sherman Act proscription.

B. Accommodation of the National Labor Relations Act, As Amended, with the Sherman Act, Requires Finding That Union Secondary Boycotts Can Violate Antitrust Laws

Although this Court has attempted to accommodate the often conflicting labor and antitrust policies, it has never directly con-

14. 29 U. S. C. Sections 101-115.

sidered the issue in terms of the impact of the 1947 Taft-Hartley amendments or the 1959 Landrum-Griffin amendments on the Sherman Act. An accommodation of the Sherman Act with the National Labor Relations Act, as amended, confirms that unions may be subject to the Sherman Act, without co-participation of non-labor sources when their conduct violates the Labor Act.

Congress, in 1947, outlawed the secondary boycott, partially in response to, and to overrule, the dictum in *Allen-Bradley* v. *Local 3*, 325 U. S. 797 (1945), that the union's hot cargo boycott, without employer complicity, would be legal under the Sherman Act.[15] The Taft-Hartley prohibition on secondary boycotts rendered unlawful and enjoinable that which before had been protected by Norris LaGuardia.

Accommodating antitrust and labor legislation, as amended by Taft-Hartley, requires a holding contrary to *Hutcheson* and contrary to the *Allen-Bradley* dictum referred to above. Since secondary boycotts were outlawed in 1947, unions engaging in such activity are subject to Sherman Act liability if the requisite restraint on competition and the product market be shown.

This Court confirmed this analysis in the case of *National Woodwork Manufacturers* v. *N. L. R. B.*, 386 U. S. 612 (1967)[16] where it reviewed the legislative history of the Taft-Hartley Act, and quoted the following Conference Report:[17]

> " 'Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B.' *Id.* at 631-2.

15. See 325 U. S. 797, 809-810 (1945).

16. That case held the hot cargo sanctions wrought by the Landrum-Griffin Bill's addition of Section 8(e) to the National Labor Relations Act of 1959 were to be interpreted as prohibiting agreements with secondary, but not primary, objectives. See, *infra*, at pp. 21-22.

17. H. R. Conf. Rep. No. 510, 80th Cong.; 1st Sess., 43.

The Court concluded:

> "In effect Congress, in enacting Section 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.*" *Ibid.*

Thus, as under *Duplex*, a union, unilaterally conducting secondary boycotts prohibited under the labor law, violates the Sherman Act if the effect of restraint on the product market is, as herein, present. The question, then, under *Jewel Tea*, is whether the union's activity is protected by the Landrum-Griffin amendments to the National Labor Relations Act.

IV.

THE PRECISE SCOPE AND LIMITATIONS OF THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, HAVE NEVER BEEN CONSIDERED BY THIS COURT; WHETHER THE UNION'S ACTIVITY IN RESTRAINT OF TRADE IN THE INSTANT CASE SERVES A LEGITIMATE LABOR INTEREST REQUIRES FULL DELINEATION OF THAT PROVISO

The issue that, under *Jewel Tea*, must be resolved and that the majority below failed to resolve in order to determine whether a union, by its conduct, violates the antitrust laws, is whether the activity complained of is protected by the National Labor Relations Act, as amended. In order to resolve the question in this case, inquiry into the nature and scope of the so-called construction industry proviso to Section 8(e) of the Act must be made. This Court has never considered a case requiring the

full delineation of this aspect of the Landrum-Griffin amendments. If this Court determines not to consider the instant matter, labor unions, through use of the proviso, would be permitted to restructure the construction industry in entire areas by eliminating non-union subcontractors and creating a monopoly for favored union subcontractors. Once a union, through the type of subcontractor agreement forced upon Petitioner herein, is able to either force non-union subcontractors from the industry or compel them to sign a collective bargaining agreement with the union, the union is then capable of controlling the market in the entire industry. If a subcontractor is unable to agree to the terms dictated by the union, he cannot obtain work and is driven from the market, as in *Pennington, supra*. Thus, the importance of this Court's considering and clearly defining the nature and scope of the Section 8(e) proviso is manifest.

A. The Proviso Does Not Raise Union Conduct Within Its Ambit to the Status of a Protected Right Under the Act Thereby Clothing Such Conduct with Immunity from the Antitrust Laws

The nature of the Section 8(e) proviso is best understood by examining both its antecedents and its place within the scheme of the Act.

Prior to the Landrum-Griffin amendments in 1959, this Court decided the *Sand Door* case, *United Brotherhood of Carpenters* v. *N. L. R. B.*, 357 U. S. 93 (1958). This Court then held that while a voluntarily agreed upon subcontractors' agreement between an employer and a union did not violate the Act, means prohibited by then Section 8(b)(4)(A) could not be employed by the union to enforce such an agreement.[18] As a result of

18. The Landrum-Griffin amendments made what was then Section 8(b)(4)(A) the present Section 8(b)(4)(B) and added the present Section 8(b)(4)(A). Those sections provide, in relevant part, that it shall be an unfair labor practice for a labor organization or its agents:

Sand Door, Congress sought to outlaw all "hot cargo" agreements; however, by way of a proviso, it exempted the construction industry from certain of the proscriptions of Section 8(e).[19] Thus, the proviso does not create or affirmatively grant the

> "(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> "(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e);
>
> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, that nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ."

19. Section 8(e) states:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work.*" (Emphasis added)

union "protected" rights;[20] it merely exempts certain subcontractors' agreements in the construction industry from the proscriptions of Section 8(e). The Union's reliance, below, on the Section 8(e) proviso, is based on its apparent view that conduct which comes within the ambit of the proviso is "protected" activity and that, therefore, it must serve a "legitimate union interest" immune from the antitrust laws. The statutory scheme further demonstrates the error of the Union's view.

Section 7 of the National Labor Relations Act sets forth the rights conferred thereunder. That Section grants rights under the Act to employees[21] and confers no protection and contains no grant of rights to employers nor to unions. Section 8 protects those employee rights granted in Section 7 by proscribing conduct on the part of employers and unions which Congress has deemed to violate those employee rights. Section 8 does not grant unions any rights and the proviso to Section 8(e) does not therefore protect any alleged union rights or interest. The proviso only exempts certain conduct within its ambit from the proscriptions of that subsection. It only renders that conduct *not* unlawful under that subsection. Thus, a subcontractors' agreement, such as the one involved herein, even if it is within the ambit of the 8(e) proviso is not protected under the Act. It is merely *not* unlawful. It still may be unlawful under other provisions of Section 8(b)(4)—or it may not. In either event, the agreement is not protected under the Act. Specifically, the Section 8(e) proviso is not a

20. As this Court found upon examination of the legislative history of the 1959 amendments, in *National Woodwork, supra,* at 634-635, Section 8(e), like the Taft-Hartley amendments of 1947, simply closed a loophole in the statutory scheme.

21. Section 7 provides:

> "Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . ."

mechanism that transforms an otherwise unlawful agreement or conduct into a protected agreement or conduct.

Therefore, whether under *Jewel Tea,* an agreement which is not unlawful under the National Labor Relations Act—but not protected by it—serves a "legitimate union interest" cannot be answered by reliance on the Section 8(e) proviso. The legitimacy of the subcontractors' agreement involved herein must stand on its own. It is not protected by the National Labor Relations Act and therefore granted no immunity thereunder from the proscriptions of the Sherman Act.

B. Union Activity in Pursuit of a Subcontractors' Agreement, Which Violates Other Sections of the Act, Precludes Such Conduct and Agreement from Being in Furtherance of a Legitimate Union Interest

Even if it be assumed that the subcontractors' agreement herein was not unlawful by reason of the construction industry proviso to Section 8(e), the Respondent's conduct remains an illegal secondary boycott under Section 8(b)(4), subsection (B), since *another objective* of defendants' conduct was to force Connell and other open shop contractors[22] to terminate existing business relationships.[23] This Court has held that it is sufficient, for a finding of an unlawful boycott under Section 8(b)(4),

22. The District Court found as a matter of fact that at the time the Union sent the contract in question to Connell, it had agreements with some seventy-five (75) contractors in the Dallas area . . . . F. Supp. . . . . , 78 LRRM 3012, 3013 (1971).

23. Connell, an open shop contractor, subcontracts work to both union and non-union subcontractors. Thus, when the Union, which expressly disavowed any interest in organizing Connell's own employees, assaults the Connell construction site, its dispute is not with Connell, it is with non-union subcontractors on other project sites. The Union's alleged objective is to induce, or coerce, suppliers to stop deliveries to Connell, and construction purchasers to cease doing business with Connell. Connell's only remedy is to terminate any relationship with open shop subcontractors, and take on union subcontractors. This objective is proscribed, rendering the defendants' acts illegal under Section 8(b)(4). *N. L. R. B.* v. *Local 825, Operating Engineers,* 400 U. S. 297 (1971).

that defendants have *an* illegal objective, *N. L. R. B.* v. *Denver Building Trades*, 341 U. S. 675 (1951). It has also been held that, assuming one of the objectives of a union's economic action is to obtain a subcontractors' agreement under the exemption provided the construction industry by Section 8(e), this is no defense to, and the union still is in violation of, Section 8(b)(4)(B) when it is clear, as evidence herein discloses, that another objective is to force the neutral employer (Petitioner and other open shop contractors) to terminate existing business relationships, *Hod Carriers*, 154 NLRB 1744 (1965), *enf'd.*, 384 F. 2d 1000 (C. A. 9, 1967).[24] It can hardly be disputed that the defendants actively sought to force and succeeded in forcing Petitioner to terminate its relationships with open shop subcontractors.[25] This Court cannot allow to stand the lower court's holding that the subcontractors' agreement, obtained by such unlawful means, is legitimate and thus immune from the antitrust laws.

However, as fully explicated below, the agreement sought and obtained by the Union herein was not a lawful agreement within the ambit of Section 8(e), even if the Union had engaged in no conduct violative of 8(b)(4)(B), and the conduct engaged in

24. Since this Court decided the *Denver Building Trades* case, no less than five times have certain members of Congress attempted without success to overrule that decision by amending Section 8(b)(4) to permit "situs picketing" on construction projects. See, H. R. 9070, 9089, 9100, 9123, 9140, 9175, 86th Cong., 1st Sess., and H. R. 9373, 86th Cong., 2nd Sess. (1960); S. 2643, 86th Cong. 2nd Sess. (1960); H. R. 10027, 89th Cong., 1st Sess. (1965); H. R. 100, 90th Cong., 1st Sess. (1967); H. R. 100, 91st Cong., 1st Sess. (1969). Thus, even though Congress enacted the 8(e) proviso in 1959, it is clear that Congress has rejected repeated attempts to make lawful conduct proscribed under 8(b)(4)(B).

25. The District Court found that after Connell was coerced into signing the agreement in question, it lost two jobs in which the successful contractor contracted with Texas Distributors to do the mechanical work. The District Court further found that Texas Distributors is a non-union firm with whom Connell had contracted to perform the mechanical work, on occasion, for a period in excess of ten (10) years .... F. Supp. ....., 78 LRRM 3012, 3013 (1971).

by the Union to compel Connell's compliance with its terms was, therefore, equally unlawful under Section 8(b)(4)(A) and 8(e).

C. The Respondent's Subcontractors' Agreement and Efforts to Obtain It Are Violative of Section 8(b)(4)(A) and 8(e) Notwithstanding the Construction Industry Proviso

Prior to the enactment of Section 8(e), this Court had condemned union activities under the then existing Taft-Hartley ban on secondary boycotts when such activities were directed against a neutral employer in the construction industry, *N. L. R. B.* v. *Denver Building Trades Council, supra;* and in the *Sand Door* case, *supra*, the Court held unlawful coercive conduct designed to enforce a "hot cargo" agreement. By enacting the proviso to Section 8(e), Congress did not legitimize coercive picketing as a means of obtaining subcontractors' agreements,[26] and did no more than preserve the state of the law with respect to such conduct as existed prior to 1959.[27] Construction unions, post 1959, therefore, enjoy no privilege to engage in coercive picketing to obtain subcontractors' agreements from a neutral employer. Such conduct is still unlawful.

In *National Woodwork, supra,* the Court considered whether a work preservation clause *in a collective bargaining agreement* between an employer and the union which represented the employer's employees violated the secondary boycott provisions of the Act. The Court held that such a *primary* clause was within

26. Then Senator Kennedy said,

> "Since the [8(e)] proviso does not relate to Section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under Section 8(b)(4) whenever the *Sand Door* case is applied. It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract." II Leg. History of the Labor Management Reporting and Disclosure Act of 1959 at 1433.

27. See, I Leg. History of the Labor Management Reporting and Disclosure Act of 1959 at 943-944.

the proviso to Section 8(e), and that the union's boycott to maintain the clause, therefore, did not violate Section 8(b)(4)(B). However, in upholding the legality of the work preservation clause as being within the ambit of Section 8(e), the Court said:

> "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employee *vis-a-vis* his own employees." 386 U. S. at 645.

The Union's conduct in the instant case fails to meet this test. Petitioner and Respondent have no collective bargaining relationship. There is no basis for such relationship since Petitioner employs no employees who perform the plumbing or mechanical work within the Respondent's trade jurisdiction. Further, the Respondent expressly disavowed any interest in representing Petitioner's employees. Moreover, the Respondent's conduct was not for the purpose of preserving any site work on the picketed job because the plumbing subcontractor on that job had a collective bargaining agreement with the union. The subcontractors' agreement and the Respondent's conduct were tactically directed elsewhere. Such conduct is condemned by *National Woodwork*.

However, this Court has never considered the precise question of whether, absent a collective bargaining relationship, the type of agreement and the conduct utilized to obtain it, as is involved herein, violates Section 8(e) and Section 8(b)(4)(A). *National Woodwork* clearly indicates that the conduct is so proscribed. Conduct so proscribed cannot be legitimate labor activity. Further, the Court, in *National Woodwork*, expressly declined to give any view as to the antitrust limitations of such agreements or conduct.[28] The instant case presents these novel issues for consideration.

28. *National Woodwork*, at 629-630.

V.

THE COURT BELOW ERRONEOUSLY FAILED TO ADJUDICATE QUESTIONS OF LABOR LAW ARISING IN THE CONTEXT OF AND VITAL TO DETERMINATION OF THE INSTANT ANTITRUST SUIT

The Fifth Circuit concluded that since the Union's conduct involved herein, in addition to being an alleged violation of the antitrust laws, is arguably an unfair labor practice, the district court below was precluded from deciding the issue. This conclusion is contrary to the dictates of this Court and leaves the Petitioner and all others faced with like demands and conduct on the part of unions without a forum for adjudication of the legality of those demands and conduct.

In *Jewel Tea, supra*, one of the questions considered on certiorari was:

> "Whether a claimed violation of the Sherman Antitrust Act which falls within the regulatory scope of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board." *Id.* at 684.

This Court answered this question in the negative and held that federal courts could determine Sherman Act complaints against unions even though the unlawful behavior was arguably an unfair labor practice:

> "[W]e cannot conclude that this is a proper case for application of the doctrine of primary jurisdiction.
>
> To begin with, courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment. Just such a determination must be frequently made when a court's jurisdiction to issue an injunction affecting a labor dispute is challenged under the Norris-LaGuardia Act, which defines 'labor dispute' as including 'any controversy concerning terms or conditions of employment', Norris-LaGuardia Act, Section 13(c), 47 Stat. 73, 29 U. S. C. Section 113(c) (1958 ed.). See *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362

U. S. 330; *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437; cf. *Teamsters Union* v. *Oliver*, 358 U. S. 283.

Secondly, the doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency. *Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 521 (Frankfurter, Jr., dissenting).

Finally, we must reject the union's primary jurisdiction contention because of the absence of an available procedure for obtaining a Board determination." *Id.* at 686-7.

The Fifth Circuit's assertion is contrary to the dictates set forth above.

First, the district courts are conversant with illegal secondary boycotts, both in injunctive proceedings brought by the NLRB and in damage actions brought by aggrieved persons under Section 303 of the Labor Management Relations Act, 29 USC Sec. 187(b). If this Court felt that the federal courts were competent to assert jurisdiction in *Jewel Tea*, where the alleged restraint of trade involved consideration of whether matters were properly subject to legitimate collective bargaining, —matters particularly within the Board's expertise—then certainly, the courts are competent to adjudicate the issue here, where there is no requirement for Board expertise.

Second, as Judge Clark's dissent points out with reference to a case involving a similar contract sent by the same Union to another contractor in the Dallas area, deferral to the Labor Board would be futile since the antitrust issue must ultimately be determined by the courts, and the Board's General Counsel refuses to issue unfair labor practice complaints in this type of case.

Finally, there is no procedure under the National Labor Relations Act by which parties to a pending antitrust action can be assured of obtaining a Board ruling on the labor law issue alleg-

edly within the Board's primary jurisdiction. Unlike some regulatory agencies, the Board's adjudicative process is not automatically put into operation by the filing of a complaint with it. Rather, there is a two step procedure. First, an unfair labor practice charge must be filed with a Regional Director of the Board, National Labor Relations Act, as amended, Section 10(b), 29 U. S. C. Sec. 160(b). An investigation of the charge is conducted under the direction of the Regional Director and on the basis of an investigation of the charge, the General Counsel, acting through the Regional Director, decides whether to issue a formal complaint or dismiss the case, National Labor Relations Act, as amended, Section 3(d) of the Act, 29 U. S. C. Sec. 153(d). The General Counsel has " 'final authority' respecting investigation of charges, the issuance of complaints, and the prosecution of complaints before the Board." *Lewis* v. *National Labor Relations Board*, 357 U. S. 10 (1958), 15-16.

Thus, since the General Counsel refuses to issue a complaint, as he did in the *K. A. S.* case referred to by Judge Clark above, the Board's adjudicatory processes are unavailable to determine whether the conduct complained of constitutes an unfair labor practice. It would thus be futile for a district court to remit the parties to the Board. Even if the General Counsel were to change his position and issue a complaint in this type of case, and the Board determined that the conduct constituted an unfair labor practice, the question of whether the conduct also constitutes an antitrust violation must still go to the courts for resolution. Such a cumbersome and circuitous procedure would not serve to expedite the resolution of these vital issues.[29]

29. The Third and Sixth Circuits have attempted to circumvent this circuitous and futile procedure by certifying the labor law question to the Board. However, as the Board points out in its briefs to those courts, it has no procedures for issuing declaratory rulings on questions of labor law arising in antitrust litigation. Its only procedure for determining the unfair labor nature of conduct is through its regular processes. See, *International Association of Heat and Frost Workers and Asbestos Workers* v. *United Contractors Association, Inc. of Pittsburgh*, 483 F. 2d 384 (CA 3, 1973); *Carpenters District Council* v. *United Contractors Association of Ohio, Inc.*, ... F. 2d ...., 84 LRRM 2276 (CA 6, 1973).

This situation points out clearly the problems faced by both the courts and contractors, such as Petitioner, in cases which involve alleged Sherman Act violations which also involve unfair labor practice conduct of the type concerned with herein. There is a dislocation within the construction industry as a result of the Board's and the lower courts' failure to deal with the problem presented by the type of conduct involved herein. Building trade unions are, as a result, permitted to engage in unlawful conduct designed to coerce the acceptance of unlawful agreements and gain control of the entire construction industry, driving up the costs of construction to thousands of contractors and millions of consumers alike, and forcing contractors out of business. As a result of this dilemma, there is no forum except this Court for an answer to this serious problem that strikes at the very heart of our economic system and threatens to destroy competition in our nation's largest industry. A clear and definitive statement by this Court is necessary to resolve this most pressing problem and put an end to the proliferation of litigation that this dislocation has spawned.[30]

30. In addition to the instant case, see *e.g., International Association of Heat and Frost Proof Workers, supra; Carpenters District Council, supra; Altemose* v. *Building and Construction Trades Council*, No. 73-773 (E. D. Pa., 1973). Rather than open up the judicial floodgates to increased antitrust litigation, a definitive statement by this Court as to whether the union conduct involved herein constitutes legitimate labor activity under *Jewel Tea*, would, to a great degree, settle many questions common to all cases involving the scope of labor's immunity from the antitrust laws. To the extent that such guiding legal principles are clarified by this Court, protracted litigation is precluded, and judicial economy is served.

CONCLUSION

For the reasons stated above, in supplementation of those stated by Petitioner, it is urged that the Petition for Writ of certiorari herein be granted.

Respectfully submitted,

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